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HAROLD B. WILLEY,

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 119

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT,

v.

COLUMBIA BROADCASTING SYSTEM, INC., APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR COLUMBIA BROADCASTING SYSTEM, INC.

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January 26, 1954.

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CITATIONS

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OPINIONS BELOW

The Report and Order of the Federal Communications Commission (hereinafter referred to as "the Commission") (R. 161) adopting the Rules in issue (R. 169) and the dissent of Commissioner Hennock (R. 170) appear in 1 F. R. 5429 and are reported in 1 Pike & Fischer Radio Regulation (Part 3), p. 91:231. The opinion of the District Court below (R. 110) and that of the dissenting Judge (R. 132) are reported in 110 F. Supp. 374.

JURISDICTION

The jurisdiction of this Court to review the judgment of the three-judge District Court below is invoked by the Commission* under 28 U. S. C. 1253 and 2101(b). The

* Though a party defendant to the action below, the United States has not appealed.

judgment of the Court below was entered on March 11, 1953 (R. 296), a petition for appeal was presented by the Commission on May 8, 1953 and the appeal was allowed on the same day (R. 298). Probable jurisdiction was noted by this Court on October 12, 1953 (R. 307).*

QUESTIONS PRESENTED

Whether subdivisions (2), (3) and (4) of paragraph (b) of certain rules adopted by the Commission, interpreting Section 1304 of the United States Criminal Code (18 U. S. C. 1304) which makes illegal the broadcasting of lottery information, correctly define "consideration", an essential element of any lottery.

Whether said Section 1304, as construed by the Commission, deprives Columbia Broadcasting System, Inc. of its property without due process of law in violation of the Fifth Amendment to the Constitution.

STATUTE INVOLVED

The provisions of Section 1304 of the United States Criminal Code are quoted *infra*, p. 11.

STATEMENT

Appellee, Columbia Broadcasting System, Inc. (CBS) desires only to supplement the Commission's statement of the facts.

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* In its order noting probable jurisdiction, this Court also consolidated for argument this case and Nos. 117 and 118, *Federal Communications Commission* v. *National Broadcasting Co., Inc.*, and *Federal Communications Commission* v. *American Broadcasting Co., Inc.*

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This action was instituted below, in a three-judge District Court, by the filing of a complaint by CBS to set aside, annul and permanently enjoin the enforcement of an Order of the Commission and the Rules thereby adopted relative to so-called quiz-giveaway radio and television programs (R. 111). The defendants in the action below were the Commission and the United States of America (R. 244).

Similar and separate actions were commenced by American Broadcasting Company (ABC) and by National Broadcasting Company (NBC) (R. 2, 146).

Counsel for the United States and the Commission conferred with counsel for CBS, ABC and NBC and it was agreed that the cases should all be heard together and should be in such form that there would be no issues of fact (R. 11-12). To that end, each plaintiff, concurrently, amended its complaint and, on the basis of (i) its complaint, (ii) a supporting affidavit and (iii) a stipulation with counsel for the defendants, moved for a summary judgment (R. 11-12, 90, 224, 282). Defendants in each action filed a cross motion for an order dismissing the amended complaint or, in the alternative, for summary judgment (R. 91, 233, 292). Defendants accompanied their motion in each case with an affidavit which did not controvert any facts alleged in the appellees' papers (R. 92, 234, 293).

All of the amended complaints and supporting affidavits were substantially identical (with minor exceptions) (R. 2-10, 12-89, 146-223, 224-231, 245-281, 282-290). The stipulation filed in each case provided that facts set forth

in all the amended complaints and affidavits could be relied upon by all parties in all the actions (R. 1, 145, 244).*

The case below was thus heard by the three-judge District Court on what was, in effect, a conceded statement of facts (R. 131). Those facts are as follows:

CBS is engaged in radio network and television network broadcasting (R. 246).

Its network business consists of the furnishing of programs to radio and television stations for simultaneous or delayed broadcast by such stations (R. 246).

Programs broadcast by radio or television stations are of two types: commercial and sustaining. Commercial programs are those sponsored by an advertiser which pays for the broadcast thereof. Sustaining programs are not sponsored or paid for by any advertiser (R. 246).

CBS, in its network operations, furnishes sustaining programs to its network stations without charge—except in the case of certain types of television sustaining programs. It also furnishes said stations with all commercial

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* For example, the stipulation in this case provided, among other things:

> "For the purposes of any motions which plaintiff or defendants or both may bring for summary judgment (a) all the allegations of fact set forth in said amended complaint shall be taken as admitted by the defendants and (b) facts set forth in the amended complaints in the companion actions of National Broadcasting Company *v.* FCC, Civil Action No. 52-37, and American Broadcasting Company *v.* FCC, Civil Action No. 52-24, and in the affidavits, or any of them, filed in either of said companion actions by either plaintiffs or defendants therein, and deemed admitted in those actions shall be deemed admitted and part of the record in this action." (R. 244)

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programs which a sponsor wishes them to broadcast and which the stations accept for broadcast. The sponsor pays CBS and the latter, in turn, pays the stations as provided in its contracts with them (R. 246).

CBS invested large sums of money in developing so-called quiz-giveaway programs—both commercial and sustaining—which involve the award of prizes to members of the listening and viewing audiences (R. 246).

Typical of these programs is *"Sing It Again"* (R. 247). On that program performers rendered a popular song with the original lyrics and then repeated it with parody lyrics, describing some person, place, event, or the like. Individuals, selected at random from telephone books, were called on the telephone during the program and allowed to contest for prizes, by identifying the person, place or event described in the parody lyrics which they heard or saw on their radio or television sets.

A prize was awarded to the contestant answering correctly. A lesser prize was awarded a contestant if his answer was wrong. The successful contestant was also granted the opportunity of identifying the voice of an unknown individual (a so-called secret voice) who sang verses giving clues as to his or her identity. Additional clues as to the identity of the secret voice were given on the program and also on other programs. The person identifying the secret voice received the main prize which increased weekly until identification was made.*

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* The program had other features, involving studio contestants, which are not here relevant because the Commission's Rules apply only to participation by members of the radio and television audience. See the majority opinion below at R. 118.

On the CBS quiz-giveaway programs, no contestant is asked to pay anything in order to be allowed to compete (R. 249).

Programs such as *"Sing It Again"* concededly "have not tended to demoralize or degrade the listening and viewing public but on the contrary have provided information and entertainment for the public" (R. 1, 5, 244). There has been no finding by the Commission that such programs have had any deleterious or harmful effect on the public (R. 249, 244).

Neither *"Sing It Again"* nor any program similar thereto was ever adjudicated by any court to be in violation of Section 1304 of the United States Criminal Code, or any criminal statute, and no criminal proceeding was ever instituted against any person, firm or corporation on the ground that any program similar to said program violates a criminal statute, state or federal (R. 249).

Quiz-giveaway programs, similar to those involved in this case, were broadcast for a decade, prior to the promulgation of the Rules in 1949, to the knowledge of the Commission (R. 252). During that period, the licenses of literally thousands of stations, including those owned by CBS, were renewed by the Commission with knowledge that the stations had broadcast such programs in the past and intended to do so in the future (R. 252).

During that same decade the Commission made repeated requests to the Department of Justice to prosecute stations for the broadcasting of such programs as violations of the lottery laws (R. 285-287, 30-63). The Department of Justice, however, refused to prosecute (R. 286, 287, 42, 46, 49, 63).

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The Post Office Department has ruled that such programs do not constitute lotteries and therefore has accepted literature relating thereto for transmittal through the mails (R. 284-5, 287, 24-27).

The Commission, in December 1943, requested the Senate Interstate Commerce Committee to amend the lottery law so as to proscribe quiz-giveaway programs. The Commission stated that it was unable to deal with the problem under the lottery statute and submitted a draft of new legislation to bar such programs (R. 28). The Senate Committee took no action on this request.

Despite this history of interpretation by all administrative agencies charged with the enforcement of the lottery laws that the quiz-giveaway programs, such as those here involved, did not constitute lotteries, the Commission on August 5, 1948 gave notice that it proposed to issue rules similar to those at bar (R. 249, 157). It issued a supplemental notice of its proposed rule making on August 27, 1948 (R. 249, 159). On October 19, 1948, the Commission, sitting *en banc,* heard oral argument (R. 249). CBS and others, with the permission of the Commission, having theretofore filed briefs, appeared and made an oral argument in opposition (R. 249-250). No evidence was taken by the Commission (R. 250).

The Commission issued its Rules pursuant to an Order entered on August 18, 1949 (R. 250, 169). The Commission accompanied them with a Report setting forth its reasons as to why said Order and Rules were valid (R. 250, 161).

Only four of the seven members of the Commission participated in the adoption of said Order and Rules (and accompanying Report)—and of those four, one dissented (R. 250, 161).

The Commission's Rules proscribe CBS quiz-giveaway programs such as *"Sing It Again"* as in violation of Section 1304 of the United States Criminal Code (R. 253). The Commission therefore will not renew the licenses of stations owned by CBS and of its network affiliate stations when they come up for renewal and it will deny all applications for licenses by them unless CBS and its affiliates refrain from broadcasting such programs (R. 253).

THE RULES PROMULGATED BY THE COMMISSION AND THEIR APPLICATION TO THE CBS QUIZ-GIVEAWAY PROGRAMS OF THE TYPE HEREINABOVE DESCRIBED

The Rules relative to quiz-giveaway programs, promulgated by the Commission, provide as follows (R. 169-170):

> *"Lotteries and Give-Away Programs:* (a) An Application for construction permit, license, renewal of license, or any other authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting or permitting 'the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.' (See 18 U. S. C. Sec. 1304).
>
> "(b) The determination whether a particular program comes within the provisions of subsection (a) depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of subsection (a) if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is

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dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize,

"(1) such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or

"(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

"(3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

"(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or writing the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question."

Hereinafter the Commission's definitions of consideration in the above subdivisions numbered (1), (2), (3) and (4) will be referred to, for convenience, by those numbers.

Of the four definitions of consideration enunciated by the Commission, definitions (1) and (4) clearly are inapplicable to CBS programs of the type described above. The CBS programs do not require the winner or winners, as a condition of winning, to furnish any money or thing of value or to have in his possession any product sold, manufactured, furnished or distributed by the sponsor or the station [Definition (1)]. So also, those programs do not require the winner or winners to answer the phone or write a letter in a prescribed manner or with a prescribed phrase [Definition (4)].

Technically, the CBS programs of the type described above do not come within the confines of definition (2) enunciated by the Commission because the winners on such programs are not *required* to be listening to or viewing the same as a condition of winning a prize. However, few contestants, selected from the radio or television audience, would be in a position to answer correctly the questions asked of them on such programs without listening to or viewing them. Thus, the Commission evidently contends that definition (2) is applicable to the aforesaid programs because in practice a person could not answer the questions correctly unless he had been listening to or viewing them and therefore, in effect, he is required to do so.

The CBS programs come within the confines of definition (3) because aids in the form of hints or clues to the correct answers to questions were given on said programs. It seems to be the Commission's theory, that since a person is not likely to have the information needed to answer questions correctly, unless he listens to or views a program, he will be induced to listen to or view it, and that this constitutes consideration for the purposes of the lottery laws.

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The CBS programs described above are condemned as lotteries under definition (3) and evidently will be so considered under definition (2) of the Commission's Rules although no member of the public is induced to stake any sum of money or anything of value.

THE COMMISSION'S REPORT

The three majority Commissioners in their Report set forth (R. 161) that the Rules constituted the Commission's interpretation of Section 1304 of the Criminal Code which provides (18 U. S. C. 1304):

> "*Broadcasting lottery information*—Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> "Each day's broadcasting shall constitute a separate offense."

The Commission's Report states that the validity of the Rules is to be determined only by whether they correctly set forth the elements of a "lottery" and not by whether they correctly set forth what is proscribed by the words "gift enterprise, or similar scheme" in said Section 1304 of the Criminal Code. The Report thus recites (R. 167):

> "* * * For the purposes of considering whether the rules before us are a proper interpretation of

> the statute, it is unnecessary to resolve the question of the extent to which the statutory terms 'gift enterprises or similar scheme' may include more than the statutory term 'lotteries'. * * * Since the proposed rules all deal with situations which contain in some manner all of the three elements of prize, chance, and some form of consideration, which have been held by the courts to be the essential features of lotteries, it is unnecessary to resolve the open question of whether the statutory terms are intended to cover a wider area.'"*

The Commission's theory of consideration is enunciated in its Report as follows (R. 168-169):

> "* * * We take official notice of the fact that one of the most important factors in securing sponsors for radio time is the number of people who probably or actually listen to the station's programs, as deter-

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* Since the Commission itself purported to define consideration in accordance with the rulings of the courts, the validity of its Rules must be judged on the basis of whether they correctly meet the test of consideration enunciated in the cases. See, *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 87; *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140; *Lincoln Electric Co.* v. *Commissioner of Internal Revenue*, 190 F. 2d 326 (C. A. 6). This was recognized by the Commission itself in its Report wherein it stated (R. 165):

> ". . . interpretative rules are controlling in any court review only to the extent that they are found by a reviewing court to embody a proper interpretation of the law they purport to interpret. . . ."

The Commission's brief in this Court states (p. 14):

> ". . . the rules are specifically intended to interpret the criminal statute and do not purport to go beyond it. If the rules do go beyond the statute, they fall for that reason. . . ."

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mined by listener surveys and other means. Therefore, especially when the listener has available a choice of services, the licensee seeks to attract the listener to create 'circulation' as a basis for the sale of radio time, and the sponsor seeks to attract the listener so that the sponsor's advertising message may be delivered and the listener induced to purchase the sponsor's product or services.

"* * *Where such a scheme is designed to induce members of the public to listen to the program and be at home available for selection as a winner or possible winner, there results detriment to those who are so induced to listen when they are under no duty to do so. And this detriment to the members of the public results in a benefit to the licensee who sells the radio time and 'circulation' to the sponsor, and to the sponsor as well, who presents his advertising to the audience secured by means of the scheme. When considered in its entirety, a scheme involving award of prizes designed to induce persons to listen to the particular program, certainly involves consideration furnished directly or indirectly by members of the public who are induced to listen."

The dissenting Commissioner, however, pointed out that (R. 171):

"The concept of 'lottery' has a long legal history. This provision, or ones similar thereto, appear in the statutes of virtually every state, and have frequently been applied by both federal and state courts. It is quite evident from the report of the majority in this proceeding that the Commission's interpretation of the term 'lottery' is novel in at least one respect. * * * Our Proposed Rules would comprehend situations in which none of the participants risked anything of value.

"I do not believe it proper for an administrative agency to broaden the interpretation of a criminal statute any further than has been done by the courts. * * *"

THE DECISION OF THE DISTRICT COURT

The majority of the District Court (Judges Leibell and Weinfeld) (110 F. Supp. 374 at 385) held that "the act of listening to a broadcast of a 'give-away' program, or viewing it on television, does not constitute a 'price' or 'valuable consideration', which is an essential element of a 'lottery'." It therefore granted the motions of CBS, NBC and ABC for summary judgment to the extent of permanently enjoining the Commission from enforcing subdivisions (2), (3) and (4) of paragraph (b) of its Rules.

Its opinion pointed out (110 F. Supp. at 385, 386, 388) that:

"Besides the offer of a prize, and the presence of the element of chance in selecting some of the participants who will contest for the prize, it must also be shown, in order to constitute a lottery, that a price, something of value, is furnished by at least some of the participants. * * *"

* * *

"It is not the value of the listening participants to the station or sponsor that is the valuable consideration contemplated by the lottery statute. It is the value to the participant of what he gives that must be weighed. What do the prospective participants give? The Commission argues that it is a 'legal detriment' to the listener or viewer to sit at home listening to the program and awaiting a telephone call from those in charge of the contest. Technically, and applying the law of contracts, that may be true.

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But that is not sufficient where a lottery statute, a criminal statute, is involved. The alleged legal detriment to the radio listener is not the kind of a 'price' or 'thing of value' paid by a participant in a lottery, which the law contemplates as an essential element of a lottery. * * *"

"The danger of 'impoverishment' to the participants and the development in them of a 'gambling spirit' have been mentioned in some of the earlier cases as the evils of a lottery. The leading case on lotteries, Horner *v.* United States, 147 U. S. 449, 13 S. Ct. 409, 37 L. Ed. 237, quotes from decisions and state laws against lotteries, and cites the 'pernicious tendencies' which the State laws were designed to prevent. I fail to see anything akin to those evils imperiling the invisible radio and television audience who listen and view the type of program condemned by subdivisions (2), (3) and (4) of paragraph (b) of the Commission's Rules. Those programs cannot be classed as a 'reprehensible type of gambling activity which it was paramount in the congressional mind to forbid'. (See Report of the House of Representatives Committee on Section 1305 of the United States Criminal Code, referred to in footnote No. 2 above.)" [Case citations omitted]

SUMMARY OF ARGUMENT

Neither Section 1304 of the United States Criminal Code* nor any of the other federal statutes relative to lotteries,

* Section 1304 proscribes "lottery, gift enterprise, or similar scheme," but for convenience we group them all and refer to lotteries. Our remarks in this summary of argument are equally applicable to gift enterprises and similar schemes. It will be shown later in the brief that the outcome of this case is not affected by the presence of the words "gift enterprise, or similar scheme" in the statute.

states in so many words that "consideration" is a necessary constituent of a lottery. It is generally agreed, however, and the Commission concedes, that something more than the mere offering of a prize dependent in whole or in part upon lot or chance is required for a lottery.

The language of the statutes themselves makes this obvious. For if Congress had intended to prohibit the offering of prizes dependent in whole or in part upon lot or chance without more, it would not have used the word "lottery" in the statutes. A prohibition against the offering of prizes dependent in whole or in part on chance would have sufficed.*

The something more required to make the offering of a prize, dependent in whole or in part on chance, a lottery is "consideration" which has been defined by the courts as the payment of money or like thing of value in return for a chance to win a large prize. This test of consideration is one which was designed to meet and protect against the evils of lotteries. It is a test which is specific and definite.

Lotteries have always been regarded as forms of wager or gambling in which money or a similar thing is paid for the grant of a chance to win. So also, it has always been

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* It is interesting to note that when, as observed above, the Commission submitted to the Senate Interstate Commerce Committtee a draft of new penal legislation making quiz-giveaway programs illegal, that draft, insofar as here pertinent, read as follows (R. 30):

> "No person shall broadcast by means of any radio station . . . and no person operating any such station shall knowingly permit the broadcasting of, . . . (b) any program which offers money, prizes, or other gifts to members of the radio audience (as distinguished from the studio audience) selected in whole or in part by lot or chance".

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understood that the evil which lottery laws were designed to eliminate was the improvident expenditure by the public of its substance induced by the lure of a chance to win.

Under subdivisions (2), (3) and (4) of paragraph (b) of the Commission's Rules, the mere act of listening to a radio program or viewing a television program by the public constitutes consideration—even though no member of the public is promised or told that he will be given a chance to contest for a prize if he does listen or view the program involved.* Under the Commission's definitions, there is no element of a wager or a gamble.

The Commission's test of consideration extends the application of the lottery laws to situations where the evil against which the lottery laws were designed to protect is not present. The fact is that the Commission has not found that quiz-giveaway programs have a deleterious or otherwise evil impact upon the public (R. 249, 244). On the contrary, such programs concededly have not tended to demoralize or degrade the public, but have provided information and entertainment for the public (R. 5, 1, 244).

The Commission has purported to predicate its interpretation of consideration on the decisions of the courts. The decisions do not support its interpretation and therefore its Rules are illegal and void. Furthermore, its interpretation of consideration is contrary to the rulings of the administrative agencies of the United States—the Department of Justice and the Post Office Department—which are directly concerned with the enforcement of the lottery laws.

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* Under subdivision (2) required listening or viewing is the test. Under subdivisions (3) and (4) the mere fact that a contestant will receive assistance in winning a prize if he is listening or viewing constitutes consideration.

Although the United States was a defendant below, the Department of Justice did not appeal to this Court.

Section 1304 of the Criminal Code, as construed by the Commission, is unconstitutional in that it deprives CBS of its property without due process of law in violation of the Fifth Amendment to the Constitution. Congress cannot declare transactions or activities in interstate commerce illegal unless they have a demoralizing or evil effect on the public. The programs here involved have no such effect.

To say the least, the Commission's construction of Section 1304 gives rise to grave constitutional questions.

If Section 1304 is susceptible of two constructions (and we submit it is not), one of which raises serious constitutional questions and the other of which does not, the latter construction should be adopted.

ARGUMENT

THE COMMISSION'S RULES INCORRECTLY INTERPRET AND APPLY SECTION 1304 OF THE CRIMINAL CODE AND ARE ARBITRARY, CAPRICIOUS, ILLEGAL AND VOID.

1. *The English Law*

At the outset, we advert to the Final Report of Royal Commission on Lotteries and Betting (1933), which culminated in the Betting and Lotteries Act of 1934 (24 and 25 Geo. 5 c. 58), because of the reliance thereon by the Commission in its brief wherein it states (p. 30): "The English statute is similar to the pattern of the legislation adopted by Congress in that it contains no limiting definition and does not mention pecuniary consideration as a necessary element."

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The Report of the Royal Commission does not support but rather rejects the theory of consideration enunciated by the Rules here under attack. The Report establishes that the lottery laws do not apply unless there is a wager wherein someone pays money or something of value for a chance. It shows the principle underlying the lottery laws to be that the public should not be encouraged to spend its substance for a chance to win a large prize. The Royal Commission's Report thus states:

> *"What is a Lottery?*
>
> * * *
>
> "Some of the earlier Lotteries Acts stigmatised certain types of schemes as lotteries, but the later Acts do not define what is a lottery and thus leave it to the Courts to decide whether a given scheme is or is not a lottery. The case law on the subject of lotteries is therefore of great importance. (p. 23)*
>
> "81. Before a scheme becomes a lottery there must be an element of chance and *an element of wager.* (p. 23) (Emphasis ours)
>
> * * *
>
> "455. These large prizes are a dazzling lure to the ordinary man or woman. To all but a few thousand people in this country, a sum of, say, £30,000 seems to offer a transformation of their lives. So attractive is the lure that most of those who take chances in a large lottery do not take the trouble to ascertain how small is the *value of the chance purchased by them,* or how infinitesimal is the possibility of their winning a prize. (pp. 131-132) (Emphasis ours)

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* Numerals in parenthesis refer to the pages of the Royal Commission's Report wherein the quoted material appears.

"Lotteries appeal with especial force to those in straitened circumstances, and to those in economic insecurity, since they hope to gain financial stability by winning a prize. The number of people in such circumstances is unfortunately high, and lottery tickets are *purchased with money* that for the sake of well-being should have been spent otherwise. (p. 132) (Emphasis ours)

"456. The effects of large lotteries upon character are more subtle and harder to determine but may well be more important in the long run than the material results. (p. 132)*

* * *

"528. Prohibition of Entry Money.—We refer in paragraph 509 to the Bills promoted before the War to prohibit newspaper competitions in which money or coupons had to be returned with entries. Several witnesses favoured the adoption of this proposal, which accords with *the principle underlying the laws against lotteries, namely, that the public should not be encouraged to spend their substance in this way.*" (pp. 154-155) (Emphasis ours.)

The Royal Commission's Report also made it clear that it regarded lotteries as a species of schemes or devices for obtaining *money* or *property* by false pretenses. It thus stated (p. 130):

"449. * * * The experience of this and other countries shows that lotteries lend themselves very easily to exploitation and fraud. There is great

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* The Commission's brief (p. 32) quotes only this one sentence from the Royal Commission's Report. The Royal Commission's Report makes it plain that it is the wager of one's money or like thing of value for a chance, which has the evil impact upon character referred to in said Report.

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scope for running up unnecessarily large or fictitious bills for expenses, or for the payment to the promoters of salaries or commission on a lavish scale. There are also many opportunities for direct fraud. When a lottery ticket is sold the purchaser receives no commodity. *All that is sold* is the assurance that a numbered counterfoil, corresponding with the ticket sold, will be placed in a drum from which the winning number will be drawn by chance. It is clearly impossible that more than a few of the ticket holders in large lotteries can ever have any personal knowledge that the bargain has been fulfilled. It is inconceivable that large lotteries should be promoted except under strict supervision or in conformity with detailed regulations." (Emphasis ours.)

The Report of the Royal Commission, it is submitted, demonstrates that under the laws of England, which the Commission's brief states are comparable to Section 1304, the quiz-giveaway programs here involved are not lotteries.

2. *The Nature Of Lotteries: Historically The Term Lottery Has Meant A Form Of Wager Involving The Payment Of Money Or Thing Of Like Value In Consideration For A Chance To Win A Prize. From The First It Has Been So Understood And Congress, Without Expressly So Stating, Has Indicated That It So Regards It.*

(a) In the earliest known lottery, authorized in 1566, there were prize, chance and consideration in that chances to win numerous prizes, the largest of which was five thousand pounds sterling, were sold for "the summe of tenne shillings sterling". See, *Ashton, A History of English Lotteries* (1893), pp. 5-16. From and after that date,

lotteries in England continued to have those elements. See, *Ashton,* op. cit., *supra.*

Lotteries in American Colonial times and in the early days of the Republic continued to have these same characteristics of prize, chance and consideration in the form of money or like thing of value paid for the chance. See, Spofford, *Lotteries in American History,* pp. 173-195 of *American Historical Association Report for 1892.* Indeed, many states of the new Republic authorized lotteries in order to raise funds for public purposes. These State sponsored lotteries, of course, contained the standard elements in that the public paid money for tickets which gave the purchasers a chance to win a large prize. See, Spofford, *op. cit., supra, passim; cf.,* Report of the Committee of the House of Representatives of Pennsylvania on Lotteries (1832); *Cohens* v. *Virginia,* 19 U. S. (6 Wheat.) 264; *Phalen* v. *Virginia,* 49 U. S. (8 How.) 163.

The evil of lotteries—that they induced improvident expenditures of money and like things of value by the public, particularly by those who could least afford to gamble—became evident at an early date. See, Tyson, *A Brief Survey Of The Great Extent And Evil Tendencies Of The Lottery System As Existing In The United States* (1833), which shows that in many instances individuals were driven to ruin and impoverishment by their expenditures of their moneys on lotteries.

(b) In the light of this background, there was no need for Congress to define what it meant by the term "lottery", when in 1827, for the first time, it restricted the use of the mails thereby (4 Stat. 238). It did not state that a lottery consisted of prize, chance and payment of

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money for the chance because the nature thereof was well understood. Congress, in 1827, thus merely provided:

> "Sec. 6, *And be it further enacted,* That no postmaster, or assistant postmaster, shall act as agent for lottery offices, or, under any colour of purchase, or otherwise, vend lottery tickets; nor shall any postmaster receive free of postage, or frank lottery schemes, circulars, or tickets."*

It is significant, however, that Congress prohibited postmasters "under any colour of purchase, or otherwise" from vending lottery tickets. It, thereby, clearly indicated in this first lottery statute that it had in mind the payment of money for the purchase of chances to win prizes.

In the lottery laws enacted since 1827, Congress has not seen fit to define what constitutes a lottery in terms of prize, chance or consideration. However, it has continued to indicate in some of those laws that it regards lotteries as schemes whereby the public is induced to part with money or property. Thus, in the Postal Laws, Congress has treated lotteries as a species of schemes whereby "*money or property*" is obtained by false or fraudulent pretenses.** In those laws, Congress has linked lotteries with "any other scheme for obtaining money or property

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* This language has survived in substantially the same form down to date. See Section 1303 of the Criminal Code (18 U. S. C. 1303).

** It should be noted that the Report of the Royal Commission of 1934, quoted above at pages 20-21, showed that it considered lotteries as devices whereunder moneys or properties were obtained fraudulently from the public which purchased chances to win a prize because it was misled as to mathematical probabilities of success.

of any kind through the mails by means of false and fraudulent pretenses". See 39 U. S. C. 259 and 732.

Committees of Congress from time to time have indicated that the reason lotteries are made illegal is that they are a form of gambling which results frequently in disaster to the public and against which the public should be protected. For example, in 1890 several committees of Congress reviewed the extent to which the mails should be closed to lotteries. After their consideration of the question, those committees rendered reports to Congress which contained the following statement:

> "It is not the object of this report to debate the question as to whether the lottery companies are inimical to public morals or of immoral tendency. The day is passed for such discussion. It is admitted, or probably not seriously denied that the existence of such *swindling schemes* is promotive *of the spirit of gambling and results in serious disaster to many citizens.* That Congress is willing to provide any remedy for the correction of these evils, within the letter and spirit of the Constitution, will be treated herein as an accepted fact . . ."* (Emphasis ours)

So also, when Congress enacted Section 1305 of the Criminal Code (18 U. S. C. 1305), exempting fishing contests from the lottery laws, the report of the Committee of the House of Representatives which drafted the legislation stated, as the reason for the exemption, that fishing contests were not the type of "reprehensible gambling

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* H. R. Rep. No. 2844 p. 4, 51st Cong. 1st Sess. (1890). See also, S. Rep. No. 1579, 51st Cong. 1st Sess. (1890).

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activity which Congress had in mind to forbid in the lottery laws".*

Gambling is a staking of money or like thing of value on the outcome of a contest, game, event or the like. As stated in *Washington Coin Machine Association* v. *Callahan,* 142 F. 2d 97 at p. 98 (C. A. D. C.):

> "To gamble, as is well known, is to risk one's *money or other property* upon an event, chance or contingency in the hope of realization of gain . . ." (Emphasis ours)

The element of risking of money or property as consideration for being granted the chance to realize gain is entirely lacking in the case at bar.

3. *The Cases Demonstrate That The Commission's Definition of Consideration Is Incorrect.*

(a) As stated in Pickett, *Contests and the Lottery Laws,* 45 Harv. L. Rev. 1196, 1205:

> "The theory behind the lottery laws is that people should be protected from dissipating their *money* by gambling against odds which are not usually fully appreciated." (Emphasis ours)

The cases, almost universally, have recognized this to be the theory of the lottery laws.

In *Phalen* v. *Virginia,* 49 U. S. (8 How.) 163 at 167-8, this Court stated:

> "The suppression of nuisances injurious to public health or morality is among the most important

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* See the U. S. Code Cong. Serv., 1950 Vol. 2 p. 3010 for the Legislative History of Section 1305.

> duties of government. Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; *it preys upon the hard earnings of the poor; it plunders the ignorant and simple.*" (Emphasis ours)

This same statement has been repeated by this Court in numerous subsequent cases. See, *Stone* v. *Mississippi*, 101 U. S. 814 at 818; *Douglas* v. *Kentucky*, 168 U. S. 488 at 496; *The Lottery Case*, 188 U. S. 321 at 356; *cf.*, *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342.

Implicit in these statements is the understanding of this Court that lotteries involve the expenditure by the public of money or like thing of value in consideration for the chance to win a prize. How else could lotteries prey upon the hard earnings of the poor and plunder the ignorant and simple?

In *The Lottery Case*, 188 U. S. 321, this Court sustained the power of Congress to prohibit lotteries in interstate commerce because of the "evils that inhere in the raising of *money*, in that mode". 188 U. S. at 356.

(b) Every judicial decision, which research has disclosed, interpreting any federal lottery statute holds that where there is no direct or indirect payment of money or something of like value on the part of some member of the public, there is no lottery. See, e.g., *Post Publishing Company* v. *Murray*, 230 Fed. 773 (C. A. 1), cert. denied, 241

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U. S. 675; *Garden City Chamber of Commerce* v. *Wagner*, 100 F. Supp. 769 (E. D. N. Y.), stay denied, 192 F. 2d 240 (C. A. 2); 104 F. Supp. 235 (E. D. N. Y.); *Peck* v. *United States*, 61 F. 2d 973 (C. A. 5); *Affiliated Enterprises, Inc.* v. *Rock-Ola Mfg. Co.*, 23 F. Supp. 3 (N. D. Ill.); *United States* v. *Hughes*, 53 F. 2d 387 (S. D. Tex.).

In the *Post Publishing Company* case, a newspaper advertised that it would publish headless photographs of fifty women shoppers, taken at random by its photographer, and that it would pay $5 to each woman who came to the newspaper office and identified her picture. The postmaster barred the newspaper from the mails, on the ground that the scheme violated the postal lottery law. The newspaper sued to be relieved of the order. In finding for plaintiff, the court held that the newspaper's plan did not "present the kind of lot or chance which the Act of Congress was striking against, because the particular kind of chance involved * * * did not require a parting with anything by members of the public for the prize offered."

In the recent *Garden City* case, *supra*, a plaintiff sued to enjoin a local postmaster from refusing to transmit in the mails, cards used to promote a scheme which the court described as follows (100 F. Supp. at p. 770):

> "(a) Each recipient of a card detaches therefrom a removable coupon bearing the same printed number as does the card itself. The sender retains the coupon, and (b) after mailing the card to the Chamber of Commerce, he (c) looks into the shop windows of the storekeepers who participate in the plan. (d) If he sees his number attached to an article displayed in one of those windows, he enters the store, presents his coupon, and receives that article."

The action of the postmaster was defended on the ground that the scheme was a lottery.

The Court, however, held that the scheme was not a lottery. It found lacking an essential element of a lottery —the risking of a sum of money or thing of value for the chance of gaining something of greater value than that which was surrendered. The Court thus stated (100 F. Supp. p. 772):

> "The examination of authorities made in the present case induces the belief that the consideration requisite to a lottery is a contribution in kind to the fund or property to be distributed. I have found no case in which the element of consideration has resided in walking or driving to look in a window, which is manifestly not a contribution to the merchandise which is distributed; the value, if any, of the physical exercise cannot be compared to the value of the prize. If this were not so, the ruling would still be arbitrary and capricious, in that no factual data are employed to support a finding that the average participant would be required to put forth a 'substantial' effort, whatever that means.
>
> "In the view of this Court, the Solicitor (of the Post Office Department) has ruled that to be a consideration, which by no common-sense process of reasoning can be so designated; no authority has been cited, nor discovered by independent effort, which vindicates the position taken for the defendant. While the use of the mails must be under governmental supervision, it is also to be remembered that the taxpayers, who shoulder a huge annual deficit from the operations of the Post Office, have a right to their day in court to contest that which imposes a strained and unnatural construction upon a word

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having a commonly accepted meaning." (Words in parentheses ours)

The Court of Appeals for the Second Circuit denied an application for a stay in the *Garden City* case for the reasons stated in the above quoted opinion of the district court. See 192 F. 2d 240.

Garden City and *Post Publishing* show that the Commission's concept of consideration is in error. If leaving home to visit a newspaper office or show windows of stores does not constitute the consideration required by the lottery statutes, then *a fortiori* remaining at home to listen to the radio or to view television does not constitute such consideration.

The state court decisions are to the same effect. See, e.g., *Commonwealth* v. *Wall,* 295 Mass. 70, 3 N. E. 2d 28; *State ex rel. Stafford* v. *Fox-Great Falls Theatre Corp.,* 114 Mont. 52, 132 P. 2d 689; *State ex rel. Beck* v. *Fox Kansas Theatre Co.,* 144 Kan. 687, 62 P. 2d 929; *State* v. *Big Chief Corp.,* 64 R. I. 448, 13 A. 2d 236; *People* v. *Burns,* 304 N. Y. 380, 107 N. E. 2d 498; *People* v. *Shafer,* 160 Misc. 174, 289 N. Y. S. 649, aff'd. 273 N. Y. 475, 6 N. E. 2d 410; *Griffith Amusement Co.* v. *Morgan,* 98 S. W. 2d 844 (Tex. Civ. App.); *People* v. *Cardas,* 137 Cal. App. 788, 28 P. 2d 99.

(c) The Commission in its brief in this Court has not cited, and it cannot cite, a single federal case in which a lottery, gift enterprise or similar scheme was found to exist even though no member of the public was induced to pay money or a thing of like value in consideration for the chance to win a prize.

So also, of the numerous state court decisions holding schemes to be lotteries cited by the Commission, all (except

for a handful regarded as sports*) involved situations in which some members of the public paid money or like thing of value as consideration for the chance to win a prize. In many of those cases, the members of the public may also have received merchandise or some like thing in return for the money paid by them; but in every such instance an inducing factor for the expenditure of money was the chance to win a prize.**

Illustrative of cases relied on by the Commission in its brief are *Horner* v. *United States,* 147 U. S. 449; *Brooklyn Daily Eagle* v. *Voorhies,* 181 Fed. 579 (C. C. E. D. N. Y.); and the Bank Night cases.†

In *Horner* v. *United States,* 147 U. S. 449, the question was whether a scheme involving bonds issued by the Empire of Austria constituted a lottery. Each bond was payable at the end of 55 years from 1864, unless earlier

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* See, e.g., *Maughs* v. *Porter,* 157 Va. 415, 161 S. E. 242, and *State ex. rel. Regez* v. *Blumer,* 236 Wis. 129, 294 N. W. 491. The *Maughs* case has been criticized in the following authorities: in 80 U. of Pa. L. Rev. 744, 18 Va. L. Rev. 465; *State* v. *Big Chief Corp.,* 64 R. I. 448, 13 A. (2d) 236; *State ex. rel. Beck* v. *Fox Kansas Theatre Co.,* 144 Kan. 687, 62 P. 2d 929 and *People* v. *Shafer,* 160 Misc. 174, 289 N. Y. Supp. 649, aff'd. 273 N. Y. 475, 6 N. E. 2d 410.

** The cases involving such situations are exceedingly numerous. No useful purpose would be served in trying to cite them. Most of them are referred to or cited in 48 A. L. R. 1115; 57 A. L. R. 424; 101 A. L. R. 1126; 103 A. L. R. 866; 109 A. L. R. 709; 113 A. L. R. 1121; 120 A. L. R. 412.

† The Commission in its Report relied only on the *Horner* and *Brooklyn Daily Eagle* cases as supporting the theory of consideration enunciated in the Rules. It is submitted that the Rules must fall because those cases do not sustain them.

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redeemed. A certain number of bonds, determined by lot, were to be redeemed each year after the date of issuance. Each bond, on redemption, was to receive the principal amount thereof, plus a small sum as interest. In addition, however, certain bonds, selected by lot, were to be awarded special prizes on their redemption, i.e., the amount paid on their redemption would be far in excess of their face value.

The public thus was asked to purchase the bonds not on their merits as an investment, but on the basis of gambling for a large return. It was evident that many people were induced to make an improvident expenditure of moneys and to tie up funds which they might well have needed for other purposes, and indeed for the necessities of life, because they were *assured of a chance* to win a large prize. As this Court noted (147 U. S. at 459), the plan was "an appeal to the cupidity of those who had money".

All the evils at which the lottery laws were directed in order to protect the public (see pp. 20, 22-26, *supra*) were present in the *Horner* case and this Court therefore ruled that the bonds constituted lotteries.*

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*Purchasers of the bonds, in theory, could not "lose" money because they would at least receive back the principal of their investment plus interest. However, this assurance was only theoretical—the Empire of Austria might (and did) become insolvent and extinct before the maturity of the bonds—55 years from 1864—the date of the issuance thereof. Purchasers thus were induced to tie up their funds for 55 years in this so-called investment—which proved improvident because the Empire of Austria became disabled from paying before the end of 55 years from 1864—by the chance to obtain a large prize.

The *Horner* case is not pertinent here. In this case, no member of the public is induced to make any outlay of money. No member of the public makes an improvident expenditure of his substance in return for a chance to compete for a prize. In short, the evil which the lottery laws were intended to eradicate is not here present.

Brooklyn Daily Eagle v. *Voorhies,* 181 Fed. 579 (C. C. E. D. N. Y.), likewise does not support the Commission's tests of consideration involved on this appeal. The scheme there involved was one wherein all members of the public were promised a chance to compete in an essay contest if they accompanied their essays with three labels cut from containers of a specified breakfast food. Some members of the public would purchase the breakfast food so as to get the labels. In other words, some members of the public would expend moneys for a breakfast food which they would not otherwise buy in order to obtain a chance to compete.

On the basis of these facts, the district judge held the scheme to be a lottery, saying (at p. 582):

> "The question of consideration does not mean that pay shall be directly given for the right to compete. It is only necessary that the person entering the competition shall do something or give up some right. The acquisition and sending in of labels is sufficient to comply with that requirement."

It is clear from the opinion that the district judge found consideration present because people were paying money to enter the competition, although they were doing so indirectly. The court referred to the fact (181 Fed. at p. 582) that sales of the product would be based upon "a desire to get something for nothing".

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The Commission, however, apparently relies on one sentence in the *Brooklyn Daily Eagle* opinion, to wit:

> "It is only necessary that the person entering the competition shall do something or give up some right."

as supporting its definition of consideration. This sentence cannot be read out of context. The Court in the *Brooklyn Daily Eagle* case was referring to a situation in which the public was induced to stake money indirectly in return for the chance of winning a large prize.

Affiliated Enterprises v. *Gantz*, 86 F. 2d 597 (C. A. 10) is illustrative of the cases involving the typical Bank Night situation. Under the scheme there involved, a theatre or other place of amusement maintained a registration book in its lobby. Any person could enter the lobby without charge and register his name in the book whereupon he would be assigned a number. All the numbers of the registrants were placed in a receptacle and, at a time and place designated in advance, one number was drawn therefrom. The name of the person holding the number was announced from the stage and in the lobby of the theatre. If that person presented himself on the stage within a short time, he was awarded a large prize. If the holder was not inside the theatre but in the lobby outside, he was permitted to enter free of charge for the purpose of collecting his prize. If no one appeared to claim the prize, the amount of the prize for that week was added to the prize for the following week.

The Court in the *Gantz* case *emphasized the fact that, although theoretically everyone could compete without pay-*

ing admission to the theatre, in practice many would go to the theatre and pay their admission price only because they would thereby obtain a chance to win a prize. The Court found that consideration was present because some members of the public, even though not all, were induced to pay money in order to obtain a chance to win a prize. It thus stated (at page 599):

> "It is further apparent that when non-paying participants and those who pay admissions are each given the same chance at drawing the prize the lucky number may represent *one who paid to get in only because of his interest in the drawing.* Indeed, that is more than probable. Then how can it be maintained that the supposed evasion converted a lottery or gambling device into a mere altruistic opportunity and occasion to bestow a gift." (Emphasis ours)

It is submitted that regardless of the language used by the courts, a factual situation (involving the payment of money or like thing by some member of the public) similar to that present in the *Horner, Brooklyn Daily Eagle* and *Gantz* cases will be found in every case (except the handful of sports adverted to above, all of which are state court cases) in which consideration was held to be present and in which a lottery or similar scheme was found to exist.

(d) **The only court—a state court—which has specifically considered the legality of a quiz-giveaway program of the type here proscribed by the Commission ruled that it did not constitute a lottery.**

Clef, Inc. v. *Peoria Broadcasting Co.*, decided in November, 1939, in the Circuit Court of Peoria County, Tenth Judicial District, State of Illinois, passed on and upheld

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the legality of a quiz-giveaway program known as Mu$ico (R. 283, 16-23).

4. *The Commission's Rules Are Inconsistent With Rulings Issued By The Agencies Of The United States Directly Charged With The Enforcement Of The Lottery Laws.*

The Commission is not directly charged with the enforcement of Section 1304. The Rules here are not in a field in which the Commission has expert knowledge. As a consequence, the Commission's views are not authoritative and, as above noted, if they run *contra* to the decided cases, they are invalid.

The enforcement of Section 1304 is primarily the function of the Department of Justice. The enforcement of other and comparable lottery laws is vested in the Department of Justice and in the Post Office Department.*

The Post Office Department has issued rulings that programs similar to those of CBS described above do not violate the lottery laws and the Department of Justice has refused to prosecute them. See pp. 6 to 7 *supra*.

It is, furthermore, a fact of the utmost significance in this case that the United States, though a defendant in this action, has not joined in the Commission's appeal. For this is not simply a case in which the failure of the Department of Justice to join in the appeal of an administrative agency may connote only doubts as to the importance of the question presented or skepticism as to the correctness of the

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* See Sections 1301, 1302, 1303 and 1305 of the Criminal Code (18 U. S. C. 1301, 1302, 1303 and 1305) and Sections 259 and 732 of the Postal Laws (39 U. S. C. 259, 732).

agency's factual findings. This is a case in which the Commission's appeal raises a bare legal question with respect to a federal criminal statute whose implementation and enforcement is the primary responsibility of the Department of Justice.

The failure of the United States to join with the Commission on this appeal can only mean that, upon full consideration, the Solicitor General has concluded that the Department should adhere to its long-standing view (see *supra* p. 6), that these programs do not violate the lottery laws.

Finally, it is to be noted that the Commission, prior to the enactment of the Rules, itself in effect conceded that programs similar to those here involved were not illegal. This appears from a letter written by the then Chairman of the Commission to Senator Wheeler, Chairman of the Senate Interstate Commerce Committee on December 30, 1943. In his letter, Chairman Fly pointed out that the existing law did not enable the Commission to deal with such programs and submitted a proposed draft of new legislation to bar them (R. 27-28). The suggested legislation was not adopted (R. 283).

We submit that the proper approach here is that taken by this Court in *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146. In that case, this Court said (327 U. S. at 156, 157-158):

> "The provisions of the [statute] would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country. * * * Under our system

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of Government there is an accommodation for the widest variety of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. * * * What seems to one to be trash may have for others fleeting or even enduring values. * * *"

It is especially important here that the statute be strictly construed because it is penal in nature. See *United States* v. *Halseth,* 342 U. S. 277, 280; *France* v. *United States,* 164 U. S. 676, 682.

5. *If Section 1304 Of The Criminal Code Is Construed To Make Programs Of The Type Here Involved Illegal, It Is Unconstitutional In That It Deprives CBS Of Its Property Without Due Process Of Law In Violation Of The Fifth Amendment To The Constitution. It Should Not Be Given Such A Construction Which Will Raise Grave Doubts As To Its Constitutionality.*

(a) CBS is, of course, engaged in interstate commerce (R. 246). See, *Fisher's Blend Station* v. *Tax Commission,* 297 U. S. 650, 655.

Congressional prohibition and punishment of activities in interstate commerce is valid only if such action is necessary to protect the public against harm or evil. See, *Brooks* v. *United States,* 267 U. S. 432, 436; *Carolene Products Co.* v. *United States,* 323 U. S. 18, 27-28.

On the other hand, legislative interference with business activities is arbitrary and violative of due process of law where such interference is not necessary to protect the public against harm or evil. See, *Weaver* v. *Palmer Bros.*

Co., 270 U. S. 402, in which state legislation interfering with business was held arbitrary and violative of the due process provisions of the Fourteenth Amendment. And this Court has ruled that Congress' powers over interstate commerce are subject to the same limitations under the Fifth Amendment as are the powers of state legislatures over intrastate commerce under the Fourteenth Amendment. Compare, *Carolene Products Co.* v. *United States*, 323 U. S. 18, with *Sage Stores Co.* v. *Kansas*, 323 U. S. 32.

Federal lottery laws, such as Section 1304 of the Criminal Code, are constitutional because the schemes at which they are directed are evil and tend to demoralize the public. See, e.g., *The Lottery Case*, 188 U. S. 321. However, the programs here involved have not been found to have any evil or demoralizing effect on the public (R. 249). On the contrary, the Commission here has admitted that (R. 5, 1 and 244):

> "Such programs have not tended to demoralize or degrade the listening and viewing public but on the contrary have provided information and entertainment for the public."

It is therefore submitted that Section 1304, if it be given the construction set forth in the Commission's Rules, violates the Constitution.

(b) To say the least, the Commission's construction of Section 1304 gives rise to grave constitutional questions, whereas the construction urged by CBS does not. Under these circumstances, the construction urged by CBS should be adopted. As stated by this Court in *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407-408:

> "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably

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> susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templars Indemnity Co.* v. *Jarman,* 187 U. S. 197, 205. And unless his rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman* v. *Interstate Com. Comm.,* 211 U. S. 407."

To the same effect, see *United States* v. *C. I. O.,* 335 U. S. 106, 120.

This Court, it is respectfully submitted, should construe Section 1304 as urged by CBS. It will thereby avoid the grave constitutional questions outlined above.

6. *The Commission's Other Contentions Are Unsound.*

(a) The Commissioner's brief (e.g., pp. 15, 19, 64) suggests that the validity of the Commission's Rules is to be determined not only by whether they correctly set forth the elements of a "lottery", but also by whether they correctly set forth activity which Section 1304 of the Criminal Code proscribes as a "gift enterprise" or "similar scheme".

At the outset, it should be noted that the Commission has not raised any such issue on its appeal herein. In its statement of jurisdiction in this Court and in its brief (p. 2)

herein, it stated that the question presented on this appeal is:

> "whether subdivisions (2), (3), and (4) of paragraph (b) of the rules, which delineate the element of *lottery consideration* in terms of required or induced attention to radio or television programs, constitute a correct interpretation of 18 U. S. C. 1304." (Emphasis ours)

The Commission's Report, furthermore, makes it clear, as noted above at p. 11, that the Rules were intended only to define what constitutes a "lottery", and not a "gift enterprise" or "similar scheme", within the proscription of Section 1304.

Securities & Exchange Commission v. *Chenery,* 318 U. S. 80, 87, demonstrates that the validity of the Commission's Rules must be determined solely on the basis set forth in its Report.

This Court should not, in the first instance, determine whether the programs here involved violate Section 1304 on the grounds that they constitute a "gift enterprise or similar scheme" and whether they should be kept off the air for that reason. That determination is one which, in the first instance, should be made by the Commission. There has been no such determination yet.

Moreover, there is no indication in the cases that a "gift enterprise or similar scheme" does not require consideration. For example, in *Horner* v. *United States,* 147 U. S. 449, the issue before this Court was whether the Austrian scheme for selling bonds violated a statute which forbade the use of the mails to lotteries, gift concerts and similar schemes. This Court drew no distinction between lotteries, gift concerts and similar schemes from the viewpoint of

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whether consideration was required. It did not even so much as intimate that consideration was required for lotteries but not for gift concerts or similar schemes. Indeed, it is inconceivable that that opinion would have been written as it was, if consideration was not required for gift concerts or similar schemes.

The fact is that "gift enterprises" involve a payment of a money consideration in the form of a purchase of an article, the purchase being induced in part by the lure of a chance to win a prize. See *Matter of Gregory*, 219 U. S. 210; 54 C. J. S. 850.

That "similar schemes" also involve the payment of a monetary consideration, see 23 Ops. Atty. Gen. 203 (1901).

In any event, since the programs here involved are not harmful to the public, it is submitted that Section 1304 would be unconstitutional if it were deemed to make them invalid as gift enterprises or similar schemes.

(b) The Commission's brief (pp. 31-32, 47) urges that the vice of lotteries lies in their promotion of a "gambling spirit" or "spirit of speculation" among participants.

Unless there is some financial expenditure by a participant in consideration for a chance to win a prize, it is meaningless to say that a program or scheme invokes a "gambling spirit" or "spirit of speculation". For example, if a wealthy person were to announce that, on a particular date and time, at a specified location, he would award prizes to individuals selected by chance, there would exist, among those who attended, what the Commission's brief (p. 47) describes as the "gambling spirit—the lure of obtaining something for nothing or almost nothing".

Yet it is clear that such a gratuitous distribution of prizes by chance is not illegal.

The Commission uses the words "gambling spirit" and "spirit of speculation" in a way which begs the question.

As stated in *O'Brien* v. *Scott*, 20 N. J. Super. 132, 89 A. 2d 280 at 282-3:

> "It begs the question, by making the test 'designed to and does appeal to * * * the gambling instinct' without defining 'gambling'. Thus we are again relegated to an ascertainment of the meaning of the basic word 'gambling'."

The word "gambling" connotes the staking of money or like thing of value on the outcome of a contest, game, event or the like. See, *Washington Coin Machine Ass'n.* v. *Callahan*, 142 F. 2d 97 (C. A. D. C.) quoted *supra* p. 25.

The element of risking of money or property in the hope of realization of gain is entirely lacking in the case at bar. There is, therefore, no "gambling" here and it cannot be said that the programs result in the promotion of the "gambling spirit" or "spirit of speculation" as those words are properly used.

(c) The Commission's brief (pp. 48, 25) indicates that members of the radio or television audience listening to or viewing quiz-giveaway programs are induced by the sponsor's advertising to purchase products or services, and that such purchases constitute consideration for the purposes of the lottery statutes.

This argument lacks merit. The authorities which we have cited above make it clear that consideration (whether it be money or like thing of value) is that which is paid or

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staked by a member of the public and in return for which he receives the *right* to a chance to win a large award.

In the quiz-giveaway programs of CBS, no member of the public is told that if he purchases the sponsor's product, he will thereby obtain the right to compete on the program. No one who purchases a product thereby obtains a chance to compete for or win a prize.

Indeed, the Commission's contention breaks down completely in connection with sustaining programs. No one listening to sustaining programs is induced to purchase anything because sustaining programs are not sponsored. No product or service is advertised on such programs. Yet the Rules do not distinguish between sustaining and sponsored programs.

(d) The Commission's view and that of the dissenting Judge below basically is that any scheme which involves the distribution of prizes by chance and which benefits the sponsor thereof is a lottery. See Commission's brief, pages 16, 21.

This view is in error because benefit to the persons who sponsor or create games or contests challenged as lotteries is not the test of consideration under the cases.

Presumably in the *Garden City* and *Post Publishing Co.* cases, the sponsors of the schemes there involved were benefitted by the number of persons who participated therein; yet consideration was not found to exist. The cases do not apply any such test. Cf. e.g., *Affiliated Enterprises Inc.* v. *Rock-Ola Mfg. Co.*, 23 F. Supp. 3 (N. D. Ill.); *People* v. *Cardas*, 137 Cal. App. Supp. 788, 28 P. 2d 99; *Griffith Amusement Co.* v. *Morgan*, 98 S. W. 2d 844 (Tex. Civ. App.).

What is important, under the cases, is the impact upon the public of the game or contest involved.

The lottery laws have been upheld as valid exercise of the police power *only* because lotteries are harmful to the public. See, *Phalen* v. *Virginia, The Lottery Case* and the other cases cited above at page 26. In none of them was there any attempt to justify the lottery laws on the ground that it was important to keep promoters from making profits.

(e) The Commission's brief (pp. 55, *et seq.*) attempts to distinguish some of the cases cited by the majority of the Court below on the ground that they involved state statutes which in terms required a valuable consideration or a monetary payment. It also (brief, p. 59) criticizes other cases on the ground that they uncritically followed the former cases.

What the Commission fails to observe is that the precise language of the statutes is not important. The fact that the cases fail to base distinctions on the precise language of the statutes demonstrates that they recognize that all the statutes are directed at the same thing—lotteries and like schemes. It demonstrates that the cases recognize that the statutes which contain the words "valuable consideration", are not directed at a more narrow type of scheme or program than those which do not use those words. The cases have not made any play on words.

(f) The Commission's brief suggests (p. 63) that the doctrine of strict construction of criminal statutes is not relevant "where, as here, the statute is not being invoked with criminal sanctions in view". This suggestion overlooks the fact that the construction of Section 1304 by this Court in this case will apply in prosecutions by the Department of Justice. Section 1304 cannot be construed one

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way for the Commission and another for the Department of Justice. It is therefore submitted that Section 1304 should be strictly construed. *United States* v. *Halseth*, 342 U. S. 277; *France* v. *United States*, 164 U. S. 676, 682.

CONCLUSION TO BRIEF

We urge that there is no warrant for extending the concept of "consideration" beyond the cases in order to convert what is essentially a matter of taste with respect to program content into a crime. The Attorney General has refused to do this, and the Congress has failed to act on the Commission's request for remedial legislation. Whether the programs here involved warrant criminal sanctions is a question which should be squarely faced and decided by Congress before those sanctions are allowed to attach. This Court, it is submitted, should not be the first to apply a lottery statute to a situation wholly different from those it was intended to reach.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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